AMGENERAL INSURANCE BHD v. MOHAMAD KASSIM SAAD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
WAN MUHAMMAD AMIN WAN YAHYA JC
[ORIGINATING SUMMONS NO: WA-24NCC-49-02-2021]
20 DECEMBER 2021

Abstract – *An insurer or insurance company cannot avoid an insurance policy, even when an insured vehicle has been sold, if the insured's name remains on the registration card of the vehicle. This includes where the insured vehicle is driven by an unauthorised driver.*

INSURANCE: *Policy – Liability – Road accident – Insured vehicle involved in accident – Claim by third party against insured and insurer – Allegation that vehicle had been sold – Whether insured vehicle had actually been sold – Whether insurable interest of insured or insurance policy affected if insured vehicle had been sold – Whether insurer could avoid insurance policy – Road Transport Act 1987*

The first defendant was the registered owner of a motorcycle ('insured vehicle') insured by the plaintiff. The name of the first defendant appeared in the insurance policy in respect of the insured vehicle. An accident later occurred involving the motorcycle ridden by the third defendant and the insured vehicle. At the time of the accident, the insured vehicle was ridden by the second defendant. The third defendant commenced an action against the first and second defendants at the Sessions Court. The plaintiff's adjustor's report, revealed that the insurance policy was void and unenforceable as, *inter alia*, (i) the insured vehicle had been sold before the accident and, therefore, was not under the first defendant's control when the accident occurred. In fact, the first defendant had affirmed a statutory declaration ('SD') stating that he had sold the insured vehicle to an acquaintance ('Zainal') and no longer had any knowledge of its condition nor the accident; and (ii) the second defendant was an unauthorised driver. In the present originating summons ('OS'), the plaintiff sought a declaration that the insurance policy was void and unenforceable under s. 96(3) of the Road Transport Act 1987. Only the third defendant opposed the OS. The issues that arose for determination were: (i) whether, factually, the insured vehicle had been sold; and (ii) even if the insured vehicle had been sold, whether it would affect the insurable interest of the first defendant or the insurance policy.

Held (dismissing originating summons):

(1) The plaintiff did not exhibit its adjustor's report and, instead, relied heavily on the first defendant's SD and police report (which substantially contained the same averments as in the SD but in a more condensed manner). The third defendant neither applied to the OS to be

converted to a writ nor applied to cross-examine the deponent of the plaintiff's affidavit in support in which the SD was exhibited. However, this did not mean that the contents of the SD must be accepted at face value. (paras 18 & 23)

(2) The following main points could be ascertained from the first defendant's SD: (i) except for the name Zainal, which could not be his full name, the first defendant had no other information on Zainal; and (ii) despite not having any contact details of Zainal, the first defendant stated that (a) he sold the insured vehicle to Zainal with the intention of repurchasing it later when he has enough money to buy it back from Zainal; and (b) discovered that Zainal had sold the insured vehicle to a third party whose identity was not known to the first defendant. Apart from these averments, there was absolutely no documentary evidence of any kind to prove that the insured vehicle was sold including any document evidencing the transfer of ownership. The sale of the insured vehicle did not appear to be a real sale but more of a mortgage or similar to a pawn transaction. The credibility of the first defendant's averment in the SD was in serious doubt and could not be accepted. Furthermore, the sale took place on 30 March 2019 but the SD was only made on 10 September 2019, which was almost one year and six months after the alleged sale of the insured vehicle and about one year and three months after the accident, which occurred on 3 June 2019. The first defendant's SD was also lodged on 10 September 2020 and this delay seriously undermined the first defendant's averments in the SD and the police report. The plaintiff failed to prove that the insured vehicle was in fact sold. (paras 30-36 & 40)

(3) The principles in the Court of Appeal's decision in *Muhamad Haqimie Hasim & Anor v. Pacific & Orient Insurance Co Bhd* ('*Muhamad Haqimie*') were directly applicable to the present case. *Muhamad Haqimie* essentially prevented an insurer or insurance company from avoiding the insurance policy even when the insured vehicle had been sold if the insured's name remains on the registration card of the vehicle. This includes where the insured vehicle is driven by an unauthorised driver. In so far as the insurance policy was concerned, it was in the name of the first defendant. The first defendant was therefore deemed to be the registered owner of the insured vehicle. It followed that the plaintiff, as the insurer, would remain liable to compensate the defendant. The plaintiff's argument that the sale of the insured vehicle would affect the first defendant's insurable interest or the insurance policy would fail altogether. (paras 50, 51, 64 & 66)

Case(s) referred to:

Abuseman Jamaluddin v. Etiqa Takaful Bhd [2020] 10 CLJ 151 CA ***(refd)***

Amalan Tepat Sdn Bhd v. Panflex Sdn Bhd [2011] 7 CLJ 121 FC ***(refd)***

Lonpac Insurance Bhd v. Mohamad Hakim Zulkifli & Ors [2017] 1 LNS 1820 HC ***(refd)***

Mohamad Zulkarnain Mustafa v. Allianz General Insurance Company (M) Bhd & Ors [2020] 1 LNS 1505 CA ***(dist)***

Muhamad Haqimie Hasim & Anor v. Pacific & Orient Insurance Co [2018] 1 LNS 627 CA ***(refd)***

New India Assurance Co v. Simirah [1966] 2 MLJ 1 ***(refd)***

Pacific & Orient Insurance Co Bhd v. Thayamal M Raman & Ors [2013] 1 LNS 456 HC ***(refd)***

Roslan Abdullah v. New Zealand Insurance Co Ltd [1981] 1 LNS 40 FC ***(refd)***

Yeap Tick In v. Pacific & Orient Insurance Co Bhd [2020] 4 CLJ 500 CA ***(refd)***

Legislation referred to:

Road Transport Act 1987, ss. 13, 91(1)(b), 94, 96(1), (2), (3), 109(1)

For the plaintiff - Melvin Selvam & Serena Azizuddin; M/s Sabarudin Othman & Ho
For the 3rd defendant - Adrian Thambyrajah & Marsila; M/s Saleha Tahir & Partners

Reported by Najib Tamby

JUDGMENT

Wan Muhammad Amin Wan Yahya JC:

[1] The plaintiff *via* originating summons in encl. 1 sought for, *inter alia*, a declaration that insurance policy no. AMD06225155 in respect of the motorcycle bearing registration no. KCL 2443 is void and unenforceable under s. 96(3) of the Road Transport Act 1987 ("RTA") ("this originating summons").

[2] The first and second defendants did not file any affidavit in respect of this application and neither have either of them appeared in person or by way of legal representation.

[3] Therefore, only the third defendant opposed this application.

Salient Background Facts

[4] The first defendant is the registered owner of a motorcycle bearing registration no. KCL 2443 ("the insured vehicle");

[5] The plaintiff issued insurance policy no. AMD0622155 ("the insurance policy") in respect of the insured vehicle under the name of the first defendant for the period from 12.47pm on 30 March 2019 to 11.59pm on 31 March 2020.

[6] On 3 June 2019 at about 10pm an accident is said to have occurred involving the motorcycle ridden by the third defendant bearing registration no. KEJ 1806 and the insured vehicle ("the accident"). At the time of the accident, the insured vehicle was ridden by the second defendant.

[7] The accident was corroborated by, *inter alia*, several police reports which were lodged by the second and third defendants as well as the police reports lodged by two other people who were involved in the accident who is one Muhammad Shaiful Azrin bin Md Alimon and one Mohd Farizul Zafrin bin Md Kasim.

[8] A suit was subsequently filed by the third defendant against the second and first defendants at the Alor Setar Sessions Court, Suit No. No. KA-A53KJ-82-03-2020.

[9] In para. 8 of its affidavit in support (encl. 2), the plaintiff averred that it had appointed an adjustor ("plaintiff's adjustor") to investigate the accident and the investigation revealed that the insurance policy which was issued under the first defendant's name is void and unenforceable based on the following grounds:

(i) The insured vehicle was not under the first defendant's control at the material time when the accident occurred as the insured vehicle had been sold before the accident.

(ii) The first defendant had failed to notify the plaintiff that the insured vehicle had been sold by the first defendant to an acquaintance (kenalan) of his called "Zainal" in March, 2019;

(iii) That the first defendant did not know the person who was riding the insured vehicle when the accident occurred;

(iv) The first defendant did not know the second defendant who is a Myanmar citizen;

(v) The first defendant had willingly (rela hati) affirmed a statutory declaration on 10 September 2020 ("D1's statutory declaration") stating that he had sold the insured vehicle in March 2019 and no longer has any knowledge of the condition (keadaan) of the insured vehicle after he sold it and that he has no knowledge of the accident on 3 June 2019;

(vi) That as the second defendant is a Myanmar citizen, the Jabatan Imigresen Malaysia Negeri Kedah did not have any record of the second defendant entering and exiting Malaysia as well as the current information regarding the second defendant;

(vii) The second defendant is an "unauthorised driver".

[10] The plaintiff has been served with a notice under s. 96(2) of the RTA.

[11] The third defendant rejects the plaintiff's assertion that the insured vehicle was sold and contents, *inter alia*, that there is no record of any transfer of ownership or sale of the insured vehicle.

A **Issues For Determination**

[12] The declarations that the plaintiff sought in the originating summons are pursuant to s. 96(3) RTA and the relevant provisions of s. 96, namely s. 96(1), (2) and (3) RTA state as follows:

B (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer **may be entitled to avoid or**
C **cancel, or may have avoided or cancelled the policy,** the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

D (2) **No sum shall be payable** by an insurer **under subsection (1)**:

(a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the proceedings;

E (b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either:

F (i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed;

G (ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or

H (iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate.

(3) **No sum shall be payable** by an insurer **under subsection (1)** if
I before the date the liability was incurred, the insurer had **obtained a declaration from a court that the insurance was void or unenforceable:**

> Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto. (emphasis added)

[13] The law is settled that in any judicial proceedings, the onus of proving any particular fact lies on the party who alleges it and in *Amalan Tepat Sdn Bhd v. Panflex Sdn Bhd* [2011] 7 CLJ 121, a case where declaratory reliefs were sought, the Federal Court held as follows:

> [13] With respect we are unable to agree with the submission of learned counsel for the respondent. As **declaration** was the main prayer of the respondent **it is a rule of practice** that before such relief is granted **there must be evidential basis to do so.** Courts are very slow in granting declaratory prayer without any evidence and argument advanced. (emphasis added)

[14] Therefore, the plaintiff must satisfy the court that the insurance policy that was issued is void or unenforceable and in connection with this, the issues for the court's determination in this originating summons are essentially as follows:

(i) Whether factually the insured vehicle has been sold;

(ii) If the insured vehicle has been sold, whether there still exists an insurable interest on the part of the assured, the first defendant; and

(iii) Even if the insured vehicle has been sold, whether it would affect the insurable interest of the first defendant or the insurance policy.

[15] Issues (i) and (ii) above are connected whereas issue (iii) is independent of both of them.

[16] It should be noted that the plaintiff raised a variety of issues in the written submissions filed on its behalf, however, I am of the considered view that the entire matter all comes down to the above three issues.

Whether The Insured Vehicle Was Sold

[17] This question is factual and its answer depends on the evidence that the plaintiff has placed before this court to prove its assertion that the insured vehicle was sold.

[18] The plaintiff did not exhibit the plaintiff's adjustor's report, assuming there is one, which contains the matters stated in para. 9 above regarding the plaintiff's adjustor's findings. Instead, the plaintiff relied heavily on D1's statutory declaration and the first defendant's police report which was lodged on 10 September 2020 ("D1's police report") which the said police report substantially contains the same averments he made in D1's statutory declaration but in a more condensed manner.

[19] Learned counsel for the plaintiff invited me to accept the contents of D1's statutory declaration and further submitted that despite being served with the cause papers in respect of this originating summons, both the first defendant, as the insured, and the unauthorised rider, being the second defendant, have not come to challenge the plaintiff's averments in the plaintiff's affidavit in support.

[20] In support of his submissions, learned counsel for the plaintiff referred to the case of *Mohamad Zulkarnain Mustafa v. Allianz General Insurance Company (M) Bhd & Ors* [2020] 1 LNS 1505; [2020] MLJU 1692 pertaining to a s. 96(3) RTA application where the Federal Court held:

> [11] Even though the police investigating officer may have given evidence implicating the insured rider and motorcycle in the accident in the Sessions Court proceedings, the learned judge was correct to decide on the affidavit evidence before her. We are of the view that the proceedings in the Sessions Court relating to the 3rd defendant's claim are separate and distinct proceedings which have no bearing on the OS proceedings in the High Court. At any rate, as the insured and insured rider were not cross-examined on their SDs and affidavits, the learned judge was justified in making her finding that there was a failure to make full and frank disclosure, which finding warranted the making of the declaration sought by the plaintiff.
>
> [12] On a perusal of the appeal record and after hearing of submission of parties, we are of the view that the *findings of fact* of the learned judge is not plainly wrong. *The 3rd defendant's complaint that the matter should have been fully tried on oral evidence is without merit as counsel did not apply to convert the OS into a writ action, nor did counsel apply to cross-examine the insured and insured rider on their SDs and affidavits.* Therefore, there was ample and uncontroverted evidence in the form of the SDs and affidavits of the insured and insured rider to show that there was a false police report made by the insured rider. (emphasis added)

[21] In the present case, the third defendant also neither applied for this originating summons to be converted to a writ nor did he apply to cross-examine the deponent of the plaintiff's affidavit in support. The third defendant's position is simply that the evidence tendered by the plaintiff, in particular, D1's statutory declaration does not in itself prove or show that the insured vehicle had been sold.

[22] Whilst I agree that the principle laid down in *Mohamad Zulkarnain* (*supra*) is regarding the acceptance of affidavit and statutory declaration as evidence where there is a lack of challenge to these documents, however, with respect to learned counsel for the plaintiff, this is not the real issue. A

[23] The real issue is whether the court should uncritically accept D1's statutory declaration without independently examining and scrutinising it first. Just because there was no application by the third defendant to convert this originating summons to a writ or apply to cross-examine the deponent of the plaintiff's affidavit in support in which D1's statutory declaration was exhibited does not mean that the court must accept the contents of D1's statutory declaration at face value. B C

[24] With all due respect to learned counsel for the plaintiff, this, to my mind, is not the correct principle of law to be applied in this situation.

[25] I would also add that the facts of *Mohamad Zulkarnain* (*supra*) are different from the facts of the instant case as the former involve allegations of fraud whereas here the issue is whether the first defendant did indeed sell the insured vehicle based on the evidence tendered. D

[26] In response to the submissions advanced on behalf of the plaintiff regarding accepting the contents of D1's statutory declaration, learned counsel for the third defendant cited the case of *Pacific & Orient Insurance Co Bhd v. Thayamal M Raman & Ors* [2013] 1 LNS 456; [2014] 7 MLJ where it was held: E

> 6. Further the *thrust* of P&O's application *rests on the statutory declaration* of DI as in "UD-3". I have mentioned the essence of the statutory declaration in paragraph 2. *The truth or otherwise of it has not been tested by D3. It has therefore not been strictly proved.* F
>
> 7. In *Merchants' and Manufacturers, Insurance Co. Ltd. v. Hunt & Others* [1941] 1 All ER 123 the insurers sought 2 declarations, that they were entitled to avoid a policy of insurance on the ground of non-disclosure and that they were under no liability to indemnify the respondents (Hunt). There the respondent Charles Hunt had taken out the policy and his son John Hunt was driving his father's con with his father's permission when the accident involving Percy and Maltida Thorne (the Thornes) occurred. The Thornes brought an action against John Hunt and his son. At page 124 appears the following note: G
>
> > EDITORIAL NOTE. At the trial of the action, it was held that the admissions of the insured party and his son, though strictly only evidence against themselves, could be made the basis of a declaration which would be binding on all parties to the action. *The Court of Appeal has wholly disagreed with this holding, and all members of the court are emphatically of opinion that the injured persons, who had* H I

A *been made parties to the action for a declaration, were vitally interested in requiring that the falsity of the representations relied on by the insurance company should be strictly proved.* (emphasis added)

[27] Apart from the issue of D1's statutory declaration being untested, the third defendant, as a third party to this application under s. 96(3) RTA should B be given every opportunity to defend his rights to oppose this originating summons. In this regard, the Court of Appeal in *Yeap Tick In v. Pacific & Orient Insurance Co Bhd* [2020] 4 CLJ 500 held as follows:

[20] **Since a declaration obtained under s. 96(3) would amount to a complete defence against any recovery proceedings by the injured third** C **party** under s. 96(1), it is therefore **only fair and logical** that the injured third party should not only be added as a party to the insurer's declaration proceedings but also **be given every opportunity to defend his or her rights to oppose the application by an insurer without qualification.** Citing privity of contract or other grounds to deprive the third party of the right to defend his or her rights is, with respect, misconceived as this D is a right provided by statute. (emphasis added)

[28] Therefore, it is not only important but crucial for me to examine in detail D1's statutory declaration and the veracity of the statements made therein, not only because the third defendant had challenged it but because the burden is still on the plaintiff to prove his averments (*Amalan Tepat* E (*supra*)).

[29] The contents of D1's statutory declaration are substantially reproduced below:

1) Saya ialah **pemilik sah** motosikal Jenis Honda Wave 125 nombor F pendaftaran KCL2443.

2) Saya telah **menjual** motosikal tersebut pada **30 Mac 2019** kepada seorang **kenalan** bernama **Zainal** di Kampung Bam, Sintok dengan kadar harga RM1600,00 kerana perlu duit untuk membayar yuran sekolah anak. Saya menjual motosikal tersebut **dengan niat** untuk **membeli semula** motosikal tersebut selepas saya cukup duit untuk G membelinya.

3) **Selepas lebih kurang 3 bulan** saya mencari kenalan saya bemama En Zainal untuk **membeli semula** motosikal saya tetapi saya mendapat tahu bahawa beliau sudah berpindah Ke Pulau Pinang. Saya tidak dapat menghubungi beliau kerana **tiada nombor telefon** H **dan alamat beliau.**

4) Saya juga **dapat tahu** bahawa **beliau sudah menjual motorsikal** saya kepada orang lain dan **saya tidak kenali pembeli baru** motosikal tersebut.

I

5) Saya **mendapat tahu** bahawa motorsikal saya bernombor KCL 2443 terlibat dalam satu kemalangan pada **3 Jun 2019** dan saya tidak mengenali penunggang motorsikal saya yang terlibat dalam kemalangan ini.

(emphasis added)

[30] Even taking D1's statutory declaration at face value, the following main points can be ascertained from its clear wording:

(i) The first defendant avers he is the lawful owner (pemilik sah) of the insured vehicle and has sold it on 30 March 2019.

(ii) The first defendant sold the insured vehicle to a person by the name of Zainal ("Zainal") who is the plaintiff's acquaintance (kenalan), which dictionary meaning means a person one knows slightly, but who is not a close friend.

(iii) It must be emphasised that except for the name "Zainal", which cannot be his full name, the first defendant has no other information regarding Zainal including his personal identification details or contact information such as Zainal's address and telephone number.

(iv) Despite not having any contact details of Zainal, the first defendant then states that he sold the insured vehicle to Zainal with the intention of repurchasing it later when the first defendant has enough money to buy it back (from Zainal).

(v) Without any contact with Zainal (it is not stated in D1's statutory declaration that the first defendant had any), the first defendant then said he discovered that Zainal had sold the insured vehicle to a third party whose identity is not known to the first defendant.

[31] It would be an understatement to say there are gaps in his averments in D1's statutory declaration and his averment that the insured vehicle has been sold.

[32] Firstly, apart from the first defendant's averments, there is absolutely no documentary evidence of any kind to prove that the insured vehicle was sold including any document evidencing the transfer of ownership.

[33] Secondly, the credibility of the first defendant's averments in D1's statutory declaration is in serious doubt and cannot be accepted for, *inter alia*, the following reasons:

(i) The first defendant's inability to identify who Zainal is. This raises the question as to whether the person called Zainal even exists.

(ii) It does not stand to reason that the first defendant would sell his motorcycle, the insured vehicle, to Zainal (who appears to be more of a stranger than an acquaintance) with the intention of buying it back when he has no means of contacting Zainal. It must be borne in mind the first defendant does not even have Zainal's phone number.

(iii) The fact that the first defendant intended to repurchase the insured vehicle seems to suggest that it was not really a sale but more akin to a mortgage or rather that the first defendant had pawned the insured vehicle to Zainal for a loan.

(iv) Without any contact with Zainal and with no means of contacting him, the first defendant somehow found out (dapat tahu) that Zainal had sold the insured vehicle.

[34] Thirdly, based on the first defendant's own statement, the sale of the insured vehicle does not appear to be a real sale but more of a mortgage or similar to a pawn transaction. If this is the case, it cannot be said there was an actual transfer of ownership or that the first defendant had divested all his interests in the insured vehicle.

[35] Fourthly, the sale took place on 30 March 2019, however, D1's statutory declaration was only made on 10 September 2020 which is almost one year and six months after the alleged sale of the insured vehicle and about one year and three months after the accident, which occurred on 3 June 2019.

[36] D1's police report was also lodged on 10 September 2020 and this delay seriously undermines the first defendant's averments in D1's statutory declaration and D1's police report.

[37] The plaintiff attempted to show to the court that it had made attempts to locate the second defendant by exhibiting a letter from the Jabatan Imigresen Malaysia Negeri Kedah dated 18 August 2020 which states, *inter alia*, that the said Immigration Department has no information on the second defendant movements and his latest employer's details.

[38] In the second defendant's police report dated 4 June 2019, the second defendant did not mention whether the insured vehicle he was riding belonged to him, whether it was sold to him or how he came to be using it.

[39] There are only two affidavits filed in this originating summons apart from the affidavit of service, one being the plaintiff's affidavit in support and the other, the third defendant's affidavit in reply (encl. 5). No further affidavit was filed by the plaintiff thereafter.

[40] Having examined D1's statutory declaration in detail and after evaluating the evidence adduced by the plaintiff in this originating summons, I find that the plaintiff has failed to prove that the insured vehicle was in fact sold.

[41] That being the case, it is not necessary to answer issue (ii) on whether there still exists an insurable interest on the part of the first defendant.

Whether In Any Event The Sale Of The Insured Vehicle Would Affect The First Defendant's Insurable Interest Or The Insurance Policy

[42] For the sake of completeness and for good measure, I will address this issue in the event I am wrong in holding that the insured vehicle was not sold.

[43] I will begin with dealing first with what constitutes an insurable interest. In this regard, learned counsel for the plaintiff cited the case of *Lonpac Insurance Bhd v. Mohamad Hakim Zulkifli & Ors* [2017] 1 LNS 1820; [2017] MLJU 1835 where the High Court held as follows:

> [10] One of the general principles under insurance is that to constitute a valid insurance policy there must exist an insurable interest. This is stated in *Halsbury's Laws of Malaysia*, Vol. 4, Malayan Law Journal SB2000 p. 37, as follows:
>
> > With regards to an insurable interest in property, the general principle for Malaysia would be that an insurable interest should exist at the time the event causing the loss occurs. Thus, an owner of a car who has sold it, would not be able to recover from a motor policy which has not expired if the car is damaged in the hands of new owner.
>
> [11] In *Robert Merkin and Maggie Hemsworth, The Law of Motor Insurance* (2nd edn, Thomson Reuters 2015) 62-3, it is stated as follows:
>
> > Insurable interest rests upon two pillars. *The first, which requires insurable interest at the date that a policy is taken out* ... is based on the need to stamp out wagering disguised as insurance ...
> >
> > The same cannot be said of the second pillar, *the principle of indemnity under which the assured can recover only what has been lost. If the assured has no insurable interest at the date of loss, then there can be no claim against the insurers.* Insurable interest is, however, concerned with the existence of an interest and not its value ...
>
> [12] At pages 68-9 of the same text, it is stated as follows:
>
> > *It is undoubtedly the case that the assured, by selling the insured subject matter of the policy and handing the subject matter to the purchaser deprives himself of any insurable interest in the subject matter* ... If the seller no longer has any interest in the vehicle, it follows that the seller cannot give permission to the purchaser to use the vehicle: there is no right possessed by the seller in respect of which permission can be given. *Accordingly, any use of the vehicle by the purchaser cannot be covered by the seller's insurance, and the purchaser will be insured if at all only under his own policy.* This was held to be the case in *Peters v. General Accident Fire and Life Assurance Corp Ltd.* [1938] 60 Ll, LR 312 and *Smith v. Ralph* [1963] 2 Lloyd's Rep. 439.
>
> [13] Our apex court in *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673 had this to say about 'insurable interest' at page 701:

> *Insurable interest can be established either by ownership, possession or direct relationship to the subject matter of the insurance.* Thus one has an insurable interest if by taking out an insurance policy one gains a benefit from the prevention of that subject matter or suffers a disadvantage should it be lost. In *Standard Chartered Bank v. KTS Sdn Bhd* [2006] 4 CLJ 79, the Federal Court held that *"to constitute an insurable interest the person insuring the property must have a legal or equitable interest in the property insured".* The interest in the insured property is thus not confined to just a legal interest *per se*.
>
> (emphasis added)

[44] I would summarise and condense the definition of "insurable interest" in the following manner:

(i) That insurable interest is divided into two parts or pillars:

(a) The assured's legal or equitable interest in the property insured which can be established either by ownership, possession or direct relationship to the subject matter of the insurance; and

(b) The principle of indemnity under which the assured can recover only what has been lost.

(ii) If the assured has no insurable interest at the date of loss, then there can be no claim against the insurers.

[45] Reverting back to the issue at hand on essentially whether it would have made any difference if the insured vehicle had in fact been sold, the case of *Lonpac* (*supra*) does not only provide the definition of what "insurable interest" is but it also goes on to say that when an insured property is sold, the insurable interest no longer exists and that the purchaser is deprived of the insurable interest.

[46] However, the Court of Appeal in a more recent decision in the case of *Muhamad Haqimie Hasim & Anor v. Pacific & Orient Insurance Co* [2018] 1 LNS 627; [2018] MLJU 629 appears to have taken a different view where the Court of Appeal held as follows:

> [11] We have given anxious consideration to the competing claims of the parties. Having done so we are of the unanimous view that the appeal ought to be allowed for the following reasons:
>
> (i) The central issue for consideration here is **whether the alleged transfer of interest from Normala to Lalmiya had the effect of rendering the policy ineffective or causing it to lapse.**
>
> (ii) **Section 13 of the RTA** sets out the procedure to be adopted upon change of possession upon transfer pursuant to a sale. It requires that the new possessor or **new owner register himself within seven days of such change of possession. This was not done in the instant case.**

(iii) **Section 109(1) deems the registered owner to be the owner of that vehicle** for the purpose of any *inter alia* proceedings under the RTA. **The current proceedings fall within the RTA.**

(iv) Accordingly **Normala is deemed to be the registered owner of the vehicle,** not Lalmiya. There is therefore **no transfer of interest from Normala to Lalmiya by operation of law.**

(v) Therefore **Normala remains the insured for the purposes of the accident.** As such it would follow that the **insurer remains liable to compensate the plaintiffs** for any injuries suffered as a consequence of the accident. **That is the primary function of this part of the RTA.**

(vi) We are fortified in our decision by sections 94 and 95 of the RTA which provide that conditions in a policy of insurance are deemed to be of no effect, again by operation of law, in relation to liability of the insurers to third parties.

(vii) **Section 94** provides that any condition in a policy issued providing that no liability shall arise under that policy or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy shall be of no effect in connection with claims under section 91(1)(b).

(viii) **Section 91(1)(b)** relates to third party claims such as the present.

(ix) It follows from these sections that **any term in the policy of insurance avoiding liability for unauthorised drivers is of no effect** under **sections 94 and 91(1)(b).** (emphasis added)

[47] In arriving at its decision, the Court of Appeal in *Muhamad Haqimie* (*supra*) had considered and explained how the various provisions of the RTA in particular ss. 13, 91(1)(b), 94, 96(3) and 109(1) applied in the case.

[48] Learned counsel for the plaintiff attempted to distinguish *Muhamad Haqimie* (*supra*) and submitted that it is different from the present case based on the following facts as stated in the said Court of Appeal case:

> [1] This is an appeal against the decision of the High Court affirming the decision of the Sessions Court in dismissing the plaintiff's claim for damages arising out of a motor vehicle accident. *The High Court however did not give effect to the benefit of a declaration obtained by the insurer of the motor vehicle under the proviso to section 96(3) Road Transport Act 1987 ("RTA"). This is because the cause papers relating to the originating summons seeking a declaration were not served on the plaintiff. However the learned Judge affirmed the decision of the Sessions Court Judge ("SCJ") in relation to liability of the insurer, which was that the insurer was not liable by reason of the insured having contravened a term of the policy of insurance.*

A [2] Essentially the SCJ found that the driver of the vehicle at the time of the accident, namely one Lalmiya binti Shukur *was not authorised by the insured,* Normala binti Abdullah Malasamy to drive the vehicle. The vehicle in question is a motorcycle No. WBQ 9192. The accident was at Batu 91/2, Jalan Gombak Kuala Lumpur and occurred on 23 June 2011.

B [3] In the course of the trial the evidence adduced disclosed that *Normala the insured, had purchased the vehicle and allowed an Indian national one Latif to utilise the vehicle. It is unclear when she purchased it and for what length of time Latif utilised the same with her permission. Next Latif apparently onsold the vehicle, without Normala's knowledge, to one Lalmiya, who is Myanmarese, in or around 2010.*

C [4] It is pertinent that the insurance policy in the instant case was taken out by Normala on 4 September 2010 until 4 September 2011. It is equally significant that Normala's name is on the registration card as the legal owner of the vehicle. This was confirmed by the witness from the Jabatan Pengangkutan Jalan ("JPJ"), Puan Hariyati binti Aziz, SP3.

(emphasis added)

D

[49] While I agree that there are some differences in the facts of *Muhamad Haqimie* (*supra*) from the instant case, however, with due respect to learned counsel for the plaintiff, I cannot see how it departs from the issues in the present case. In fact, quite the opposite, the similarities of the main issues E decided in *Muhamad Haqimie* (*supra*) to the present case cannot be denied or ignored and they are, *inter alia*, as follows:

(i) They involve the determination of whether the sale of an insured vehicle renders the insurance policy void and unenforceable;

F (ii) Whether the knowledge or consent of the insured or owner of the insured vehicle has any bearing on the operation of the law under the applicable provisions of the RTA, namely for the purpose of a declaration to avoid an insurance policy under s. 96(3) RTA; and

(iii) The legal effect of the person named in the registration card of the G insured vehicle and whether he or she remains the insured for the purposes of the accident notwithstanding the sale of the insured vehicle.

[50] I am of the view that the above passages from *Muhamad Haqimie* (*supra*) which I quoted are clear and the principles laid down are directly applicable to the present case. *Muhamad Haqimie* (*supra*) essentially prevents H an insurer or insurance company from avoiding the insurance policy even where the insured vehicle has been sold if the insured's name remains on the registration card of the vehicle. This includes where the insured vehicle is driven by an unauthorised driver.

I

[51] In so far as the insurance policy is concerned, it is in the name of the first defendant. If there was a transfer or change of ownership of the insured vehicle, the insurance policy would automatically have been cancelled, terminated or changed by the plaintiff as the insurer. This is something that was considered in *Muhamad Haqimie* (*supra*).

[52] Learned counsel for the plaintiff also attempted to avoid applying *Muhamad Haqimie* (*supra*) by referring to a number of cases from other jurisdictions which related laws are not identical to the RTA. In addition to this, learned counsel also referred to the following two Federal Court cases:

(i) *New India Assurance Co v. Simirah* [1966] 2 MLJ 1; and

(ii) *Roslan Abdullah v. New Zealand Insurance Co Ltd* [1981] 1 LNS 40; [1981] 1 MLRA 445.

[53] Both *New India Assurance* (*supra*) and *Roslan bin Abdullah* (*supra*) essentially involve the issue of the sale of an insured vehicle. In *New India Assurance* (*supra*) the Federal Court decided that if there was a sale of the insured vehicle prior to the accident then the insurer would not be liable under the insurance policy.

[54] Similarly, in *Roslan bin Abdullah* (*supra*) the Federal Court considered the issue of whether an insurance policy can be assigned by the insured to a third party as well as the issue of permission or consent given by the insured to a third party to drive the insured vehicle. The Federal Court in *Roslan bin Abdullah* (*supra*) took a similar position as *New India Assurance* (*supra*).

[55] The case of *Lonpac* (*supra*) which was relied on by learned counsel for the plaintiff applied *Roslan bin Abdullah* (*supra*).

[56] It is important to note that *New India Assurance* (*supra*) was based on, *inter alia*, the Road Traffic Ordinance, 1958 while *Roslan bin Abdullah* (*supra*) was based on, *inter alia*, the Motor Vehicles (Third Party Risks) Ordinance (Cap. 130) and Road Traffic Act 1934. All these provisions are no longer applicable.

[57] The RTA is the current applicable provision in so far as the present case is concerned and I am bound by the decision of *Muhamad Haqimie* (*supra*) which specifically deals with s. 96(3) RTA as well as the other relevant provisions of the RTA which I have mentioned earlier.

[58] At the hearing of this originating summons, learned counsel for the plaintiff cited a more recent case, that is the Court of Appeal case of *Abuseman Jamaluddin v. Etiqa Takaful Bhd* [2020] 10 CLJ 151; [2021] 1 MLRA 100 and submitted in the alternative (which submission was not contained in the plaintiff's written submissions (encl. 10)) that the court can, based on *Abuseman* (*supra*), grant the declarations sought against the first and

second defendants only if not against the third defendant being the third party who was the alleged victim of the accident. As the case of *Abuseman* (*supra*) was only referred to and submitted by learned counsel for the plaintiff at the hearing of this originating summons, I invited parties to submit further on it and further written submissions were then filed by parties.

[59] The case of *Abuseman* (*supra*) not only referred to *Muhamad Haqimie* (*supra*) but also reaffirmed *Muhamad Haqimie* (*supra*). Therefore, *Abuseman* (*supra*) does not really support the plaintiff's case on the issue that the sale of the insured vehicle would entitle the plaintiff to avoid the insurance policy under s. 96(3) RTA. In connection with this, the Court of Appeal in *Abuseman* (*supra*) held as follows:

> [34] The effect of s. 96 read with s. 94 RTA 1987 has been considered and pronounced in the following cases. In the case of *Malaysia National Insurance Sdn Bhd v. Lim Tiok* [1997] 1 MLRA 43, *the Supreme Court endorsed the view that the underlying purpose of compulsory motor insurance against third party risks was to ensure that innocent third parties who were injured in vehicular accidents were given full and effective protection, regardless of the private insurance arrangement between the insurer and the insured.*
>
> …
>
> [36] In the recent decision of *Muhamad Haqimie Hasim v. Pacific & Orient Insurance Co Bhd* [2018] MLRAU 184, the Court of Appeal had occasion to consider the effect of *inter alia s. 94 of the RTA 1987*, in circumstances where the registered owner of the insured vehicle had sold the vehicle to another person, although the insured's name remained on the registration card as the legal owner of the vehicle. The Court of Appeal held *the registered owner remains the insured for the purposes of the accident and that the insurer is liable to compensate the plaintiff for any injuries suffered as a consequence of the accident.* The Court of Appeal had stated as follows:
>
> > ... (vi) We are fortified in our decision by ss. 94 and 95 of the RTA which provide that conditions in a policy of insurance are deemed to be of no effect, again by operation of law, in relation to liability of insurers to third parties.
> >
> > (vii) Section 94 provides that any condition in a policy issued providing that no liability shall arise under that policy or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy shall be of no effect in connection with claims under s. 91(1)(b).
> >
> > (viii) Section 91(1)(b) relates to third party claims such as the present. (emphasis added)

[60] Further, there is material difference in the facts of *Abuseman* (*supra*) from the present case in that in *Abuseman* (*supra*) the insured there had committed several breaches of the insurance policy. These facts are not only dissimilar with the present case but they are also based on breaches of specific terms of the insurance policy in that case. The relevant passages from *Abuseman* (*supra*) are reproduced below:

> [11] The grounds relied on by the applicant in encl. 1 were as follows:
>
> (i) Failure to comply with the terms and conditions of the Insurance Certificate No TGPC-PC 195025-BRTQKVCH which are as follows:
>
> a. Failure to notify the Applicant of the said accident in accordance to the terms and conditions as stipulated within the said Insurance Policy;
>
> b. Failure to notify the police of the said accident in accordance to the terms and conditions as stipulated within the said Insurance Policy; and
>
> c. Entered negotiation with the third-party rider for the purpose of settlement without any written consent from the Applicant.
>
> [12] The relevant terms and conditions of the said Policy relied on by the applicant are reproduced as follows:
>
> Private Car Certificate
>
> All accidents must be reported to the Police within 24 hours
>
> Conditions – These Apply To The Whole Certificate
>
> 2. Accidents and Claims Procedures
>
> (a) The insurer must be notified in writing or by phone in either case with particulars of the vehicles involved, date of accident and, if possible, a brief description of the circumstances of the accident within the specific time frame as follows after an event which may become the subject of a claim under this policy:
>
> (i) Within seven (7) days if the insured is not physically disabled and hospitalised as a result of the event.
>
> (ii) Within thirty (30) days or as soon as practicable if the Insured is physically disabled and hospitalised as a result of the event.
>
> (iii) Other than (i) and (ii), a longer notification period may be allowed subject to specific proof by the Insured.
>
> ...
>
> ...
>
> (e) No negotiation, admission or repudiation of any claim may be entered without our prior written consent. (emphasis added)

[61] It is because of these clear breaches of the insurance policy by the insured that the Court of Appeal in *Abuseman* (*supra*) allowed the declaration to avoid the insurance policy as against the insured only but not against the third party (or victim of the accident). In this regard, the Court of Appeal held as follows:

> [24] The crux of this appeal is *premised on the statutory interpretation of relevant sections of the RTA 1987,* in particular where it relates to third parties to an insurance contract, as is the case of the 2nd respondent in this appeal. The gist of the contention of the 2nd respondent is that s. 96 of the RTA 1987 should be read with s. 94 of the RTA 1987. Section 94 in effect renders any condition excluding insurers from liability under the policy to third parties to be inoperative. Such a reading, it was further submitted, would enforce the spirit of the RTA 1987 which is essentially a social legislation which seeks to preserve the rights of third parties in the event that a policy is repudiated by an insurer due to breaches of the policy by the insured. *Any such breach or breaches of the insurance contract by the insured (the 1st respondent) can only be grounds for repudiation inter partes against the insured but is inoperative against any third parties as expressly stipulated in s. 94 RTA 1987.* (emphasis added)

[62] I declined to accept the alternative position submitted by learned counsel for the plaintiff for the declarations sought in this originating summons to be given as against the first and second defendants only, based on the following reasons:

(i) This alternative position was only brought about through subsequent submissions and they were not supported by averments in the plaintiff's affidavit in support (being the only affidavit filed by the plaintiff in this originating summons (apart from its affidavit of service);

(ii) In this regard, the plaintiff's affidavit in support did not specifically address the issue of a breach of the terms of the insurance policy by the first defendant with reference made to those terms or, more importantly, the repudiation of the insurance policy by the plaintiff arising from the breach of the specific terms of the insurance policy by the first defendant (see *Abuseman* (*supra*)); and

(iii) The alternative relief sought against the first and second defendants only was not specifically prayed for in the originating summons.

Conclusion

[63] On the issue of the alleged sale of the insured vehicle and whether it would make a difference if the insured vehicle had in fact been sold, the cases relied on by the learned counsel for the plaintiff were mostly, if not all, before the decision of *Muhamad Haqimie* (*supra*) and many of them were based on the position of the law before the RTA.

[64] Given the Court of Appeal's decision in *Muhamad Haqimie* (*supra*) I do not see how the declarations sought in this originating summons can be allowed when the first defendant is deemed to be the registered owner of the insured vehicle (in the absence of any documentary evidence in this originating summons to the contrary) and the first defendant being the insured under the insurance policy for the purposes of the accident. It therefore follows that the plaintiff, as the insurer, would remain liable to compensate the defendants bearing in mind that the insurance policy would have been cancelled, terminated or changed, as the case may be, had there been a proper sale and transfer of ownership of the insured vehicle.

[65] *Abuseman* (*supra*) only reinforces this point.

[66] In any event, I had already decided that factually there was no sale of the insured vehicle and therefore the plaintiff's argument that the sale of the insured vehicle would affect the first defendant's insurable interest or the insurance policy would fail altogether.

[67] Based on the aforesaid reasons, I dismissed this originating summons and awarded costs of RM5,000 in favour of the third defendant.